HARVARD LAW REVIEW.

Published monthly, during the Academic Year, by Harvard Law Students.

SUBSCRIPTION PRICE, $2.50 PER ANNUM. . . . . 35 CENTS PER NUMBER.

EXECUTORY CONTRACTS FOR THE SALE OF LAND AS AFFECTED BY EMINENT DOMAIN. — An executory contract was entered into for the sale of land, the seller giving a bond to convey a title free from incumbrances. Before the time for conveyance, a fourth part of the land was taken by right of eminent domain. The purchaser claimed the right of rescission, and sought to recover that portion of the purchase money which he had paid. Recovery was allowe l on the ground that there was a sufficient failure of consideration to justify a rescission of the contract. *Kares* v. *Covell*, 62 N. E. Rep. 244 (Mass.). Although the case is dismissed quite summarily, it presents in a new way a much controverted question: must not the purchaser, as incident to his equitable right to specific performance, bear the loss of an injury to the premises which occurs, without the fault of either party, between the making of the agreement and the time for transferring the legal title? This subject has usually been considered in cases where the injury was occasioned by fire. But the same principles are applicable when the land is taken by eminent domain. In neither case is there any fault on the part of the vendor.

There are three possible views as to the risk of loss in an executory bilateral contract for the sale of land. It may be said, as in the principal case, that the loss is upon the vendor, because if he is unable to convey what he has promised, there is a failure of consideration, and he cannot exact payment from the purchaser. This view, necessitated by a strict

adherence to the doctrine of implied conditions in the law of contracts, prevails in Massachusetts and several other states. *Wells* v. *Calnan*, 107 Mass. 514; *Thompson* v. *Gould*, 20 Pick. (Mass.) 134; *Wilson* v. *Clark*, 60 N. H. 352. The purchaser, however, may assume the risk if such is the intention of the parties. And one writer, finding an indication of such intention in the fact of a transfer of possession to the purchaser, has ably argued that the loss should fall upon the party in possession of the premises at the time of the accident. See 9 HARV. L. REV. 106. The third view, as a result of the equitable doctrine of specific performance, puts the risk upon the purchaser from the moment that the contract is made. *Paine* v. *Meller*, 6 Ves. 349. From that moment equity treats the seller in many respects as a mortgagee or trustee holding the legal title merely as security for the price. He cannot convey a good title to any one having notice of the contract; his creditors cannot reach the land; it will pass under a devise of his trust estate; and he must use husbandlike care in its management. The buyer on the other hand is like a *cestui que trust* or mortgagor. His interest passes as real estate to his heirs or devisee; it is subject to his widow's dower; by recording the contract he can prevent his interest from being divested by any sale; he is chargeable with the costs of compulsory improvements; and any increase in the value of the premises accrues to his benefit. See 1 COL. L. REV. 1. In only one respect, apparently, does the analogy break down; the vendor does not have to account for the rents and profits. This is so because it is only just to allow him the use of the land until he is entitled to the use of the purchase money. From the making of the contract, therefore, the purchaser becomes practically the *dominus*. Equity has given him at once, as incident to the right of specific performance, substantially everything he bargained for. Justly, then, it would seem, it puts upon him the risk of accidental loss. This is the view generally accepted. *Paine* v. *Meller*, *supra*; *Brewer* v. *Herbert*, 30 Md. 301; see *Imperial, etc., Co.* v. *Dunham*, 117 Pa. St. 460, 477.

The acceptance of this view necessitates a decision opposed to that of the principal case. Such a result was reached in the only similar cases which have been found. *Stevenson* v. *Loehr*, 57 Ill. 509; *Kuhn* v. *Freeman*, 15 Kan. 423. It has even been held that though all the land be taken the purchaser must still pay. *Gammon* v. *Blaisdell*, 45 Kan. 221. But, as the equitable owner, he is entitled to whatever compensation is made. LEWIS, EM. DOM., § 319.

THE RESTRAINT OF LIBEL BY INJUNCTION. — For one hundred and fifty years there has existed a tradition having the force of absolute law that equity has no jurisdiction to enjoin a libel. The cases declaring such to be the law all refer to two decisions, *Huggonson's Case*, 2 Atk. 469 (1742), and *Gee* v. *Pritchard*, 2 Swanst. 402 (1818).

In the former a bill was filed to commit two defendants for having published a libel. Lord Hardwicke very properly adopted the ground that he could not punish them for libel, as the only relief was at law. It is to be noticed that the bill asked chancery to punish a past tort, not to restrain a future one. And the decision would have been the same had the offence been assault or trespass. The case of *Gee* v. *Pritchard*, *supra*, contains a *dictum* by Lord Eldon that equity will not restrain the pub-